

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, et al.)	
)	
Plaintiffs)	
)	
v.)	Case No. 4:05-cv-00329-GKF-SAJ
)	
TYSON FOODS, INC., et al)	
)	
Defendants)	

**DEFENDANTS' RESPONSE TO STATE OF OKLAHOMA'S MOTION IN
LIMINE TO PRECLUDE DEFENDANTS FROM MAKING CERTAIN
CATEGORIES OF REFERENCES TO ITS PRIVATE COUNSEL [DKT. #2418]**

Come now the Defendants¹ and submit the following in Response to the *State of Oklahoma's Motion in Limine to Preclude Defendants from Making Certain Categories of References to its Private Counsel* [Dkt. #2418]:

The State's motion seeks the exclusion of evidence concerning its private counsel related to the fact that certain of the State's private counsel are not from Oklahoma; none of the State's private counsel are state employees; the private counsel are serving under a contingency fee contract and will only be paid if they are successful in this litigation; the private counsel previously represented the State in litigation against certain cigarette manufacturers and then contributed significant sums to General Edmondson for his political campaigns. These facts are relevant to the issues in this case and the arguments that the State will likely make, thus, the Defendants should be permitted to introduce such evidence at trial if the State makes similar arguments.

¹ The Defendants joining in this Response include all remaining Defendants with the exception of Cargill, Inc. and Cargill Turkey Production, LLC. .

Legal Standard

Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Fed. R. Evid. 401. Relevant evidence is generally admissible. Fed. R. Evid. 402. Whether evidence is relevant is within the sound discretion of the trial court. *Gomez v. Martin Marietta Corp.*, 50 F.3d 1511, 1518 (10th Cir. 1995) (*citations omitted*).

Argument

I. Evidence concerning the fact that some of the State’s private counsel are not from Oklahoma is relevant and admissible to respond to the State’s constant references to the Defendants and their counsel being from out of state.

The State complains about references to its counsel as being from out-of-state yet the State and its counsel have continuously referred to the Defendants as being the “out-of-state corporate polluters.” Defendants will agree to not make any comments concerning the State’s counsel being from out-of-state if the State will agree to stop referring to the Defendants as the “out-of-state corporate polluters” and other such allegations concerning these “Arkansas corporations polluting Oklahoma’s waters” and if the State will cease making comments concerning the fact that some of the Defendants’ attorneys are not from Oklahoma. As the State noted in its Motion, attempting to influence the jury through regional bias is improper. *See, e.g., Pappas v. Middle East Condominium Assoc.*, 963 F.2d 534, 541 (2nd Cir. 1992). However, what’s good for the goose is good for the gander thus, if the State is going to continue to refer to the Defendants and their counsel as the “out-of-state corporate polluters” then the Defendants

are entitled to rebut those statements with the fact that many of the State's attorneys are also from out-of-state.

II. Evidence concerning the history and the nature of the relationship between the State's private counsel and the State is relevant to the issues of bias, prejudice, and the motivation for filing this lawsuit.

The remaining issues raised in the State's motion deal with the history and nature of the relationship between the Attorney General and the State's private counsel, such as the fact that the lawyers primarily prosecuting this case on behalf of the State are not State employees but instead are private attorneys retained on a contingency fee contract basis and the fact that the State's private counsel previously represented the State in tobacco litigation and then turned around and paid substantial amounts of the fees recovered in that litigation to Drew Edmondson for his political campaign.

The fact that the State's lawyers are not State employees and are instead private attorneys who only get paid if the State prevails is relevant to the issues of bias and prejudice and the motivation for filing this case against these Defendants. The State presumably acts only for the common good when it institutes litigation. A state lawyer "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore . . . is not that it shall win a case, but that justice shall be done." *See Berger v. United States*, 295 U.S. 78, 88 (1935). The purpose of these rules is to ensure the public that those who wield the state's power "will be guided by their sense of public responsibility for the attainment of justice" and not for their own personal financial gain. *Young v. United States*, 481 U.S. 787, 814 (1987). Because these principles are presumably in place and practiced by the government, the jury may be left

with the impression that just because the State filed this lawsuit it necessarily follows that the State's claims have merit. The Defendants are entitled to reveal to the jury the truth of the situation which is that private attorneys whose own personal financial wealth is at stake in the outcome of the case are the ones who are primarily prosecuting this case.

The fact that the State's private attorneys have their own financial gain at stake in this case is also relevant because the Attorney General and his private attorneys have repeatedly raised the issue of their personal motivation in bringing this case. Plaintiffs have alleged and presumably will argue to the jury that they were "forced" to file this lawsuit because the Defendants would not act responsibly and would not negotiate in good faith. Plaintiffs have also raised their personal memories of the IRW and its historical condition and have suggested that their case is motivated by their personal desire to return the IRW to that pristine condition. The Plaintiffs' motivation for filing the case is not an element of any of the claims alleged in the Second Amended Complaint, but may substantially bias the jury against the Defendants. The Defendants are entitled to counter those allegations about the nobleness of Plaintiffs' motivations with the truth about the motivation for this lawsuit: money and politics. By repeatedly stating that they "were forced" to file this lawsuit because the Defendants refused to act responsibly, the State has put its motive for filing the lawsuit at issue; it apparently believes its motivation for filing the lawsuit is relevant. Thus, the Defendants are entitled to introduce their own evidence concerning the true motivation for the State and its counsel to bring this action. If the Defendants are not permitted to introduce evidence of the true motivation of the State and its private counsel for filing this lawsuit then the jury will be misled and confused which will cause unfair prejudice to the Defendants.

Along this same line, the State wishes to preclude the Defendants from introducing evidence that its private counsel previously represented the State in litigation against certain cigarette manufacturers and then made huge donations to the Attorney General's political campaigns. But Plaintiffs have already stood before the Court and referred to the Defendants and their counsel as being like the "tobacco defendants." As previously stated, the nature and history of the relationship between the State and its private counsel is relevant to the issues of bias, prejudice, and the motive for filing this lawsuit. *See, e.g., Resource Assoc. Grant Writing and Evaluation Services, LLC v. Maberry*, 2009 WL 1255367 (D.N.M. April 28, 2009) (evidence concerning motive for filing the lawsuit admissible); *Richardson v. Rutherford*, 787 P.2d 414 (N.Mex. 1990) (evidence concerning motive for filing the lawsuit admissible). The Defendants are entitled to defend themselves against the pretend self-righteous indignation portrayed by the State and its private counsel by introducing facts concerning the history and the nature of the previous transactions between the State and its private counsel.

Conclusion

Defendants ask that the Court deny the *State's Motion in Limine to Preclude Defendants from Making Certain Categories of Reference to Its Private Counsel* because the information sought to be excluded is relevant to the issues of motive, bias and prejudice and is necessary for the Defendants to defend themselves against allegations of the State and its counsel.

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CERTIFICATE OF SERVICE

I hereby certify that on 20th day of August, 2009, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants

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